83-988

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

ALONZO BERRONG and JACK McKAY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MARK J. KADISH
ROSALYN S. KADISH
KADISH AND KADISH, P.C.
955 West Wesley Road, N.W.
Atlanta, Georgia 30327
(404) 351-6200

QUESTIONS PRESENTED FOR REVIEW

1. Whether the warrantless entry upon Petitioner Berrong's home property for the purpose of conducting a search for criminal activity and the subsequent seizure of a marijuana field invaded the curtilage of the home in violation of the Fourth Amendment.

Alternatively, whether the warrantless search and seizure violated the Fourth Amendment because Petitioner had a reasonable expectation of privacy in the open field.

2. Whether the admission of taped conversations and testimony of witnesses concerning events that occurred after the termination of the alleged conspiracy denied Petitioner McKay his rights to due process of law and to a fundamentally fair trial as guaranteed by the Fifth and Sixth Amendments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

ALONZO BERRONG and JACK McKAY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioners, ALONZO BERRONG and JACK McKAY, Appellants in the court below, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above case on August 22, 1983. That decision affirmed a judgment of conviction by a jury in the United States District Court for the Northern District of Georgia, Gainesville Division, on April 16, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, affirming the judgment of conviction, is reported at 712 F.2d 1370 (11th Cir. 1983) and is set forth as Appendix "A".

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 22, 1983. A timely Petition for Rehearing with Suggestion for Rehearing En Banc was denied by that court on October 13, 1983. Exhibit "B" attached hereto. This petition for certiorari is being timely mailed for filing within sixty days of that date, pursuant to Rule 28.2 of this Court. The jurisdiction of the Supreme Court is invoked pursuant to 28 United States Code; Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of

life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On February 11, 1982, Petitioners were charged in a two count indictment with conspiracy to possess with intent to distribute marijuana in violation of Title 21, U.S.C. §846 and possession of marijuana with the intent to distribute, in violation of Title 2 U.S.C. §841(a)(1) and Title 18 U.S.C. §2. Also named in the indictment were co-defendants Nathan Dowdy, David Griffith, Kathleen Muglia and Carlos Nations.[1]

Petitioners entered pleas of not guilty to the indictment and on April 16, 1982, a jury returned a verdict finding Petitioners guilty of both counts. Thereafter, Petitioner McKay was sentenced to fifteen years incar-

[1] Defendants Griffith and Muglia were granted immunity and ordered to testify at trial. They subsequently refused to testify and as a result, the government dismissed the indictment against Nations and Dowdy.

ceration as to Count One and ten years incarceration as to Count Two, to commence to run with the expiration of the sentence served on Count One. A special parole term of five years was imposed to follow the sentence imposed on Count Two. In addition, Petitioner McKay was fined $50,000.00.

Petitioner Berrong was sentenced to ten years on each of the two counts to run concurrently. A special parole term of five years was imposed to follow the sentence imposed on Count Two and a $50,000.00 fine was imposed.

Following over-flights of the mountainous terrain that comprised the residential property belonging to petitioner Berrong, agents of the Georgia Bureau of Investigation conducted a warrantless search and seized the contents of a marijuana field located on the Berrong property. The Berrong residence was situated off U.S. Highway 76 and its access was by means of private, unpaved, posted, non-county maintained, single lane road. The marijuana field was located approximately one-quarter mile from the Berrong main house, but only 50 yards from a shed and a log house which once was occupied by Berrong's parents. (Tr. 175-76) The panel determined that the field was just 75 steps away from a camper trailer which was located on the property and which contained an alarm receiver installed to protect the field.

REASONS FOR GRANTING THE WRIT

1. The question of whether, under the instant facts, the officers' warrantless entry upon Petitioner's home property for the purpose of conducting a search for criminal activity and their subsequent seizure of a marijuana field, constitutes an invasion of the curtilage of the home in violation of the Fourth Amendment should be deter-

mined by this Court. Alternatively, if the Court determines that the curtilage does not extend to the field in question, the Court should consolidate this case with those where certiorari has been granted to further explicate the application of the open fields doctrine, as Petitioner asserts an expectation of privacy in the field located on his property.

a. The panel of the Eleventh Circuit Court of Appeals concluded that the marijuana field on the Berrong property could not be considered part of the curtilage of the home. An extremely narrow definition of curtilage was applied by the Court. The panel concluded that the curtilage of the farm home is formed by the buildings constituting an integral part of the group of structures, *Walker v. United States*, 225 F.2d 449 (5th Cir. 1955), and that the outer limits of the curtilage extends to "the outer walls of the extreme outbuildings", *United States v. Williams*, 581 F.2d 451, 454 (5th Cir. 1978). Thus, they found that the field in question, just yards from the log cabin and steps away from the camper trailer should not be considered part of the curtilage of the Berrong property: "Since the marijuana field was located beyond all of the buildings on the property, it was beyond the curtilage of the home" (712 F.2d at 1374) and, therefore, they concluded that Petitioner had no expectation of privacy in the field.

Petitioner respectfully disagrees. In *Williams, supra*, the former Fifth Circuit held that "warrantless searches are improper absent exigent circumstances, *at least when the investigating officers have intruded upon the curtilage for the purpose of conducting a search for criminal activity.*" (At 453) (Emphasis added) In *United States v. Jackson*, 588 F.2d 1046, 1053 (5th Cir. 1979) the Court reiterated that when government agents enter into the curtilage of

a person's property they necessarily intrude upon the individual's reasonable expectation of privacy.

In the instant case, although the government initially attempted to justify the search based upon an extremely questionable search warrant, they ultimately abandoned that theory and conceded that the search was indeed warrantless. Thus, there is no question here that the officers had intruded upon the curtilage for the purpose of conducting a search for criminal activity. The officers certainly were not legitimately within the curtilage for any other purpose.

The panel relied on the definition of curtilage as articulated in *United States v. Williams*, *supra*. Petitioner contends that because the instant facts are distinguishable, *Williams* should not provide the definition to be applied here. In that case, the Fifth Circuit determined that agents approached the defendant's property from the rear through the wooded area. From an area *behind* the fence which delineated the property, the agents detected the odor of moonshine liquor. Thus, their furtive investigation did not begin with deliberate entry onto the defendant's property as was the case here. Because the agents here intruded upon Petitioner Berrong's property solely for the purposes of conducting a warrantless search for criminal activity, a more expansive definition of curtilage should have been applied.

More closely analogous to the instant case is *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *aff'd by an equally divided court*, 537 F.2d 227 (5th Cir. 1976) (en banc). As in *Holmes*, we are not here dealing with an accidental sighting from outside the curtilage or from within while on another lawful purpose. The agents here entered the property solely to secure evidence of a crime.

Appellant Berrong had a reasonable expectation of privacy in the entire property which comprised his homestead. The property was separated from the main road by an unpaved, single-lane, posted road. An alarm system, which the panel determined was used to guard the marijuana field, was found in an old car near the barn and approximately 250 to 300 yards from the house. The alarm system receiver was found in the camper trailer located only 75 steps from the marijuana field. The field was surrounded by a line of trees. Thus, there was every indicia that it was anticipated that the contents of the field would remain private. As the *Holmes* court stated:

> The government would have us ignore the character of the Moody property. Whatever precautions a homeowner in an urban area may have to take to protect his activity from the senses of a casual passerby, *a dweller in a rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush* by putting up signs warning the government to keep away.

At 870. An individual often has a very reasonable expectation of privacy in his private property and it is this expectation which the Fourth Amendment protects. *United States v. Hunt*, 505 F.2d 931, 937 (5th Cir. 1974). Implicit in such court decisions is the finding that the reasonable expectation of privacy in one's home extends to the area within its curtilage. *Holmes, supra*, at 870. The high degree of judicial sanctity accorded to dwellings is premised on the concept of privacy and the homeowner's right to be let alone.

Petitioner respectfully contends that this Court should review the panel opinion in the instant case and find that the warrantless search and seizure of the contents of the

marijuana field should be protected by the Fourth Amendment. Because the unique facts of this case have not been previously considered by this Court and because the term "curtilage", as applied to the instant facts, has not been clearly defined by the Circuit Court of Appeals, this Court should grant certiorari.

b. Alternatively, Petitioner respectfully requests that the Court consolidate the instant case with those cases in which certiorari has been granted to further explicate the application of the open fields doctrine.

Petitions for certiorari have been granted involving the application of the open fields doctrine in *United States v. Oliver*, 686 F.2d 356 (6th Cir. 1982) (en banc), *cert. granted*, ___ U.S. ___, 103 S.Ct. 812, 74 L.Ed.2d 1012 (1983); *State v. Thornton*, 453 A.2d 489 (Me. 1982), *cert. granted*, ___ U.S. ___, 103 S.Ct. 1520, 75 L.Ed.2d 944 (1983); and *State v. Brady*, 406 So.2d 1093 (Fla. 1982), *cert. granted*, 456 U.S. 988, 102 S.Ct. 2266, 73 L.Ed.2d 1282 (1983). In a fourth analogous case, a petition for certiorari has been filed, *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3260 (U.S. Sept. 22, 1982) (No. 82-508).

If this Court should determine that the open fields analysis is in fact, applicable to the instant case, then adjudication of this Petition should be withheld until decisions are rendered in those cases.

As the certiorari petitions demonstrate, courts have been divided as to how the open fields doctrine should be applied. Although Petitioner has argued, *infra*, that the field in question was protected by the Fourth Amendment as it came within the curtilage of his home property, if this Court should continue to apply the open fields analysis, then further explication of this doctrine is

necessary before proper application can be made to the instant facts.

If consolidation of the instant case with those where certiorari has been granted is inappropriate, then this case should be remanded to the Court of Appeals for the Eleventh Circuit for further opinion consistent with the Court's explication of the open fields doctrine.

2. The ruling of the district court in admitting taped conversations and testimony of witnesses was in conflict with Supreme Court precedent because the conversations were made after the termination of the alleged conspiracy.[2]

At approximately 1:00 P.M. on the afternoon of August 5, 1981, GBI agents raided a marijuana field located on the property belonging to co-defendant Alonzo Berrong located in Towns County, Georgia. (V. 7:306-307) The alleged marijuana was cut down, loaded into a tractor trailer truck and driven to Gainesville, Georgia where it was weighed. (V. 7:291) Although no arrests were made at that time, the field was secured and leveled. The marijuana was destroyed; only samples were retained.

Petitioner McKay contends that the trial court erred in admitting into evidence certain coconspirators' declarations that were made after the conclusion of the charged conspiracy. Trial counsel objected to the admission of coconspirators' declarations on hearsay grounds. (V.

[2] Although this issue was raised as an issue on appeal to the Eleventh Circuit, the panel rejected the claim without discussion. (712 F.2d at 1371). Petitioner McKay then argued in his Petition for Rehearing with Suggestion of Rehearing En Banc that the Circuit Court's silence on that issue prejudiced his ability to seek meaningful review by this Court since without a reasoned exposition for the basis for its action, this Court was hampered in exercising an informed power of review. See *United States v. Will*, 389 U.S. 90 (1967).

3:629, 630) The objection was overruled, but the court permitted a continuing objection. (V. 3:631)

The trial court erroneously admitted into evidence a taped conversation between government informant Chief Deputy Sheriff Jimmy McKinney and co-defendant Alonzo Berrong, which was made on October 14, 1981, more than two months after the raid and long after the termination of any alleged conspiracy.

The trial court further admitted into evidence a second taped conversation which took place on November 5, 1981, between McKinney and Berrong, and which implicated McKay.

Before declarations of alleged coconspirators are admissible against an accused, three elements must be satisfied: (a) that a conspiracy existed; (b) that the coconspirator and the defendant against whom the coconspirator's statement is offered were members of the conspiracy; and (c) that the statement was made during the course and in furtherance of the conspiracy. *United States v. James*, 590 F.2d 575 (5th Cir. 1979).

The limitation upon the admissibility of statements of coconspirators was codified in Federal Rules of Evidence 801(d)(2)(E) of coconspirators to those made "during the course and in furtherance of the conspiracy" is consistent with the position of this Court. *Anderson v. United States*, 417 U.S. 211 (1974); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Krulewitch v. United States*, 336 U.S. 440 (1949).

In *Krulewitch*, *supra*, the high court enunciated a standard that has been consistently followed and is directly applicable to the instant case. There, certiorari was granted to consider the alleged error in admitting

certain hearsay testimony. The time of the alleged conversation was more than a month and a half after the activity charged in the indictment had concluded:

> Whatever original conspiracy may have existed between petitioner and his alleged co-conspirator to cause a complaining witness to go to Florida in October, 1941, no longer existed when the reported conversation took place in December, 1941. 336 U.S. at 442.

The Court concluded that the essential aim of the alleged conspiracy—transportation of the complaining witness to Florida for purposes of prostitution—"had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her". 336 U.S. at 442.

The court *rejected* the government's argument (which is similar to the argument propounded by the government in the instant case) that even after the central criminal objectives of the conspiracy have succeeded or failed, an implicit subsidiary phase of the conspiracy survives, "the phase which has concealment as its sole objective". 336 U.S. at 443.

The *Krulewitch* court determined that the statement in question was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because, if made, it was after those objectives either had failed or had been achieved. Therefore, the hearsay declaration attributed to the alleged coconspirator was not admissible. The court further noted:

> This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts. The government now asks us to expand this

> narrow exception to the hearsay rule and hold admissible a declaration, not made in furtherance of the alleged criminal transportation conspiracy charged, but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment. No federal court case cited by the government suggests so hospitable a reception to the use of hearsay evidence to convict in conspiracy cases. 336 U.S. at 443-44.

The court further rejected the government's contention that if admission of the statement was deemed to be error, the court should hold the error harmless. Instead, it was determined that admission of the hearsay declarations left grave doubt as to whether the error had a substantial influence in bringing about the verdict. The court reversed the conviction, stating: "We cannot say that the erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner". 336 U.S. at 445.

The *Krulewitch* case was reaffirmed in *Lutwak v. United States*, 344 U.S. 604 (1953). Here again, the question was the admissibility of hearsay declarations of coconspirators after the main purpose of the conspiracy had been accomplished; again the government attempted to extend the life of the conspiracy by an alleged subsidiary conspiracy to conceal. Although in *Lutwak*, unlike *Krulewitch*, the existence of a subsidiary conspiracy to conceal was charged in the indictment, the court again rejected the government's theory, holding that no such agreement to conceal had been proved or could be implied.

In the instant case, the alleged coconspirators' statements were made after the conclusion of the conspiracy charged in the indictment. Clearly, the marijuana field had been destroyed at the time of the August 5, 1981,

raid, and the alleged operation had ceased. There was no longer any potential for recovery. See *United States v. Smith*, 578 F.2d 1227, 1233, n. 12 (8th Cir. 1978) (while a conspiracy is presumed to continue until all of its criminal objectives have been accomplished, there was no potential for recovery here since the heroin operation had ceased).

As in *Krulewitch* and *Lutwak*, the government here cannot *imply* a conspiracy to conceal from the mere fact that the main conspiracy was kept secret. The crucial teaching of *Krulewitch* and *Lutwak* is that after the central criminal purposes of the conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detention and punishment. See also *Grunewald v. United States*, 353 U.S. 391, 402 (1956). Moreover, the harmless error doctrine is inapplicable here. The test established by this Court is whether or not there is a reasonable possibility that the admission of the statements contributed to the convictions. *Schneble v. Florida*, 405 U.S. 427 (1972); *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967). It cannot be concluded that the coconspirators' declarations in question in the instant case did not reasonably contribute to the conviction.

This Court should grant certiorari for the purpose of resolving the conflict between the Circuit Court's affirmance of Petitioner McKay's conviction with controlling Supreme Court precedent.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

KADISH AND KADISH, P.C.

By: _____
MARK J. KADISH

By: _____
ROSALYN S. KADISH

CERTIFICATE OF SERVICE

This is to certify that I have this date served the following persons with copies of the within and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit: Solicitor General of the United States, Room 5614, Department of Justice, Washington, D.C. 30530, and Ms. Lark Tanksley, Assistant United States Attorney, United States Courthouse, 75 Spring Street, S.W., Atlanta, Georgia 30303, by depositing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to insure delivery.

This the _____ day of December, 1983.

_____
MARK J. KADISH

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8286

D. C. Docket No. CR82-01G

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALONZO BERRONG AND JACK McKAY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

August 22, 1983

ISSUED AS MANDATE: Nov. 4, 1983

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alonzo BERRONG and Jack McKay,
Defendants-Appellants.

No. 82-8286.

United States Court of Appeals, Eleventh Circuit.

Aug. 22, 1983.

Defendants were convicted in the United States District Court for the Northern District of Georgia, William C. O'Kelley, J., of possession of marijuana with intent to distribute and of conspiracy to possess marijuana with intent to distribute, and defendants appealed. The Court of Appeals, R. Lanier Anderson, III, Circuit Judge, held that no legitimate expectation of privacy in marijuana field located within one-quarter mile of one defendant's residence existed and consequently, search of field and seizure of marijuana did not violate Fourth Amendment.

Affirmed.

1. Criminal Law 1169.1(7)

Even if district court erred in denying motion to suppress alarm system and receiver used to guard marijuana field, such errors were harmless beyond reasonable doubt where, in light of other evidence presented in prosecution for possession of marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute, probative weight of items seized was miniscule. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846; U.S.C.A. Const.Amend. 4.

2. Searches and Seizures 7(5)

Warrantless search and seizure is presumptively unreasonable, subject to few specific exceptions. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures 7(10)

As general rule, test for applicability of Fourth Amendment does not focus on question whether area or place is constitutionally protected, but whether defendant can claim reasonable expectation of privacy. U.S.C.A. Const. Amend. 4.

4. Searches and Seizures 7(10)

Analysis of reasonable expectation of privacy for Fourth Amendment purposes proceeds in two parts: first, it must be determined whether defendant has shown that he seeks to preserve something as private; second, it must be determined whether defendant's subjective expectation of privacy is one that society is prepared to recognize as reasonable. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures 7(10)

What is curtilage of house, and therefore, within realm of legitimate expectation of privacy for Fourth Amendment purposes, is question of fact. U.S.C.A. Const. Amend. 4.

6. Searches and Seizures 7(20)

Where marijuana field was located beyond all buildings on defendant's property, and consequently, beyond curtilage of home, and field was one-quarter of a mile from home, defendant did not have reasonable expectation of privacy in field and search of field and seizure of marijuana did not violate Fourth Amendment. U.S.C.A. Const.Amend. 4.

Douglas W. McDonald, Sr., Cornelia, Ga., for Berrong.

Robert J. Reed, Gainesville, Ga., Mark J. Kadish, Atlanta, Ga., for McKay.

S. Lark Ingram, Asst. U.S. Atty., Atlanta, Ga., for the U.S.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

Appellants Alonzo Berrong and Jack McKay were convicted of possession of marijuana with intent to distribute, 21 U.S.C.A. § 841(a)(1) (West 1981), and of conspiracy to possess marijuana with intent to distribute, 21 U.S.C.A. § 846 (West 1981). Their appeal consists of several claims. We reject each of these claims and affirm the convictions. The only claim that merits any discussion concerns Berrong's allegation that evidence was obtained from an illegal search of a marijuana field. The remainder of this opinion deals with this Fourth Amendment question.

FACTS

On July 30, 1981, Charles King of the Georgia Bureau of Investigation ("GBI") received information that marijuana was being grown on property owned by Lucy Berrong, wife of appellant Alonzo Berrong. On August 2, King rented a plane and a pilot and flew over the Berrong property. While flying approximately 800 feet above the ground, King was able to see the Berrongs' property, including their home, a barn, a mobile home, a camper

trailer, and what appeared to be a field containing marijuana. On August 4, King flew over the Berrongs' property at 500 feet above ground, and he confirmed his prior observation that the field contained marijuana.

The next day, the GBI searched the marijuana field. At 7:15 a.m., a GBI ground observation crew arrived at the marijuana field after walking from a public road through woods and fields for almost two hours. The crew members concealed themselves in the woods surrounding the marijuana field in the hope of capturing the marijuana growers trying to harvest marijuana. Although the agents waited for nearly six hours, nothing happened. At 1:00 p.m., the agents searched the marijuana field and seized the marijuana.

The constitutionality of the search depends in part on the layout of the Berrongs' property, specifically the relative location of the marijuana field and the Berrongs' house. Although the record does not completely describe some points, the layout of the Berrongs' property can be deduced from trial testimony.[1] The Berrong residence is located near U.S. Highway 76. A one-lane unpaved driveway leads from this highway to the Berrongs' house. A mobile home and a barn were located next to the house. An old unusable Ford Mustang, lacking an engine and seats, stood next to the barn near the driveway, approximately 250 to 300 yards from the house. This Mustang contained an alarm system used to guard the marijuana field. Farther down the driveway were several other structures. These included a shed, a camper trailer which contained the alarm system's receiver, a log cabin, and a small uncovered shed. Beyond the cabin and this last

[1] Photographs of the property were introduced as exhibits in the trial below. The record on appeal does not include these photographs.

shed stood a line of trees which surrounded the marijuana field, a square area which covered one acre. The line of trees surrounding the field was 50 yards from the log cabin, 75 steps from the camper trailer, and approximately one-quarter of a mile from the Berrongs' residential house. The record does not contain any particularized description of the boundaries of the Berrongs' property. It seems that both the field and the camper trailer were located in an area leased by Berrong to persons whom the record does not identify.

DISCUSSION

[1, 2] The question for decision concerns the lawfulness of the search and seizure conducted on August 5, 1981.[2] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The government proceeds on the theory that

---

[2] Appellant Berrong does not contest the aerial observations made by Agent King. Though this is far from clear from appellant's argument on appeal, appellant appears to challenge the introduction into evidence of the alarm system and the receiver. These two items were seized by Agent King on August 5. King, who had been receiving radio communications from the ground crew, entered the Berrongs' property after the ground crew began to search the field. King entered the Berrongs' property on their private driveway. King proceeded to the marijuana field after he spoke with appellant Berrong, who was mowing the lawn at the time. Returning from the field to the house, King seized the alarm system, which was in the floorboard area of the Mustang. Then he seized the alarm system's receiver, which was attached to the camper trailer. According to King's testimony, both of these items were in plain view. Other items were seized, but the government did not seek to introduce these other items into evidence.

Assuming that appellant was sufficiently challenged the introduction into evidence of the alarm system and the receiver, we hold that the seizure of the alarm system and the receiver does not require reversal. The government sought to justify the seizure of these objects based on the plain view doctrine, *see Coolidge v. N*

the search and seizure was warrantless.[3] A warrantless search and seizure is presumptively unreasonable, subject to a few specific exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). In this case, the government seeks to apply the so-called open fields doctrine as one of the specific exceptions.

The open fields doctrine evolved from Justice Holmes' statement that the "special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields." *Hester v. United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed.2d 898 (1924). *Hester v. United States* upheld a visual search conducted by two revenue officers while trespassing on the open fields of the defendant's land. 265 U.S. at 58-59, 44 S.Ct. at 446. The Supreme Court has recently granted petitions of certiorari in three cases in-

---

shire, 403 U.S. 443, 465, 91 S.Ct. 2022, 2037, 29 L.Ed.2d 564 (1971) (opinion of Stewart, Douglas, Brennan, and Marshall, JJ.). We need not decide the applicability of this doctrine because our review of the record convinces us that, even if the district court erred in denying the motion to suppress these two objects, such error was harmless beyond a reasonable doubt. *Chambers v. Maroney*, 399 U.S. 42, 53, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970); *United States v. Bulman*, 667 F.2d 1374, 1384 (11th Cir.1982), *cert. denied*, 456 U.S. 1010, 102 S.Ct. 2305, 73 L.Ed.2d 1307 (1982). In light of the other evidence presented at trial, "the probative weight of the items seized . . . [the alarm system and receiver] was miniscule." 667 F.2d at 1384.

[3] Although the GBI agents obtained a search warrant, it is not at all clear from the record when that search warrant was obtained. The warrant itself is not in the record. The district judge noted that the search warrant, which was dated August 4 at 5:40 p.m., bears a judge's signature followed by the statement *nunc pro tunc*, 10:07 a.m., August 11, 1981. Record on Appeal, vol. 8, at 147. Other testimony indicated that the search warrant was received before August 5. Record on Appeal, vol. 7, at 186-87. In any event, the government does not rely on the search warrant to justify the search conducted on August 5, and therefore we also ignore the warrant.

volving the application of the open fields doctrine.[4] A reading of the lower court opinions in these cases suggests that courts have divided as to how the open fields doctrine should be applied. That the *Hester* open fields doctrine remains with us in some form does not appear to be in dispute. *See Rakas v. Illinois*, 439 U.S. 128, 143 n. 12, 99 S.Ct. 421, 430 n. 12, 58 L.Ed.2d 387 (1978); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352, 97 S.Ct. 619, 628, 50 L.Ed.2d 530 (1977); *United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 2409, 49 L.Ed.2d 300 (1976); *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 865, 94 S.Ct. 2114, 2115-2116, 40 L.Ed.2d 607 (1974); *compare United States v. Knotts*, ___ U.S. ___, ___ & ___, 103 S.Ct. 1081, 1085, & 1086, 75 L.Ed.2d 55, 62 & 64 (citation to *Hester*) *with United States v. Knotts*, ___ U.S. at ___, 103 S.Ct. at 1088, 75 L.Ed.2d at 66 (1983) (Blackmun, J., concurring in the judgment) (majority opinion's citation to the open fields doctrine is unnecessary).

[3, 4] As a general rule, the applicability of the Fourth Amendment does not focus on the question whether an area or a place is constitutionally protected, *Katz v.*

[4] *See United States v. Oliver*, 686 F.2d 356 (6th Cir.1982) (en banc) (as a matter of law, a defendant-landowner can have no reasonable expectation of privacy with respect to an open field on his land), *cert. granted*, ___ U.S. ___, 103 S.Ct. 812, 74 L.Ed.2d 1012 (1983); *State v. Thornton*, 453 A.2d 489 (Me.1982) (open fields doctrine not applicable to justify warrantless search of defendant's land), *cert. granted*, ___ U.S. ___, 103 S.Ct. 1520, 75 L.Ed.2d 944 (1983); *State v. Brady*, 406 So.2d 1093 (Fla.1982) (open fields doctrine not applicable where officers crossed a dike, rammed through one gate, cut the chain lock on another gate, cut or crossed several posted fences, and proceeded several hundred yards before they were in a position to observe criminal activity), *cert. granted*, 456 U.S. 988, 102 S.Ct. 2266, 73 L.Ed.2d 1282 (1982); *see also United States v. Dunn*, 674 F.2d 1093 (5th Cir.1982) (Fourth Amendment proscribed warrantless search of a barn which was within the curtilage of the home), *petition for cert. filed*, 51 U.S.L.W. 3260 (U.S. Sept. 22, 1982) (No. 82-508).

United States, 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967), but rather whether the defendant can claim a "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. at 360, 88 S.Ct. at 516 (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). Analysis of such expectation proceeds in two parts. First, it must be determined whether the defendant "has shown that 'he seeks to preserve [something] as private.' " *Smith v. Maryland*, 442 U.S. at 740, 99 S.Ct. at 2580 (quoting *Katz v. United States*, 389 U.S. at 351, 88 S.Ct. at 511). Second, it must be determined whether the defendant's subjective expectation of privacy is "one that society is parepared to recognize as 'reasonable.' " *Katz v. United States*, 389 U.S. at 361, 88 S.Ct. at 516-17 (Harlan, J., concurring).

The question whether appellant Berrong exhibited a subjective expectation of privacy need not detain us because, applying the second prong of the *Katz* test, we conclude that the expectation, if any, was not reasonable.[4] "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law

[4] It is arguable whether appellant Berrong exhibited a subjective expectation of privacy. The record indicates the total absence of any fence, wall, "no trespassing" signs, or other artificial obstructions to entry on the property. Of course, the existence of the alarm system suggests that someone had such an expectation. However, the record does not clarify whether Berrong shared that expectation. The alarm system was attached to the camper trailer. At trial, the district judge asked defense counsel whether the Berrongs lived in the trailer. One of the defendants' attorneys responded, "we don't know who was living there." Record, vol. 8, at 175. Berrong's attorney offered no further explanation. Besides the alarm system, the record suggests that the marijuana growers used vicious watchdogs to guard the marijuana field. The dogs were apparently off duty when the GBI agents searched the field.

or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. at 143 n. 12, 99 S.Ct. at 143 n. 12. Binding precedent clearly states "that there is no legitimate expectation of privacy in outbuildings and open fields, even if fenced, unless they are part of the curtilage, or the immediate appurtenances, of a home." *United States v. Long*, 674 F.2d 848, 853 (11th Cir.1982); *United States v. Williams*, 581 F.2d 451, 453 (5th Cir. 1978).[4] Although the distinction between the open fields and the curtilage of a home is not talismanic, *United States v. Jackson*, 588 F.2d 1046, 1053 n. 12 (5th Cir.), *cert. denied*, 442 U.S. 941, 99 S.Ct. 2882, 61 L.Ed.2d 310 (1979), that distinction does reflect what expectations of privacy were reasonable in this case.

[5, 6] What is curtilage is a question of fact. *Hodges v. United States*, 243 F.2d 281, 283 (5th Cir.1957); *Walker v. United States*, 225 F.2d 447, 449 (5th Cir.1955). In denying the motions to suppress the evidence obtained in the search and seizure, the district judge viewed the photographs and the map of the property and said "the search of the field involved could not have been part of any curtilage or have been included in anything that anyone had a right of expectation of privacy of." Record on Appeal, vol. 7, at 184-85. We uphold the district judge's ruling. The curtilage of the home is formed by the buildings "constituting an integral part of that group of structures making up the farm home," *Walker v. United States*, 225 F.2d at 449, or "the immediate domestic establish-

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209. *Cf. Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit. *Id.* at 34.

ment" of the home, *Hodges v. United States*, 243 F.2d at 283. The "outer limits of the curtilage" have been expressly defined to be "the outer walls of the extreme outbuildings of the curtilage." *United States v. Williams*, 581 F.2d at 454. Since the marijuana field was located beyond all of the buildings on the Berrongs' property, it was beyond the curtilage of the home. Moreover, the field was one-quarter of a mile from the home. At this distance, any expectation of privacy stemming from the home to the surrounding area was diminished. Absent any clear and specific demonstration of an expectation of privacy in the field, justified by custom or property concepts, the distinction between the curtilage and the open fields should be applied.[7]

We hold that appellant did not have a reasonable expectation of privacy in the marijuana field. The search of the field and the seizure of the marijuana did not violate the Fourth Amendment.

AFFIRMED.

---

[7] It might have been argued, though appellants have not presented any evidence or argument on this point, that the curtilage of the camper trailer and the log cabin must also be determined. Of these, the log cabin was closest to the field, standing 50 yards away. However, the record indicated that the log cabin was not used as a dwelling place. As for the camper trailer, the record indicated that the camper trailer may have been used as a temporary residence, but there is no indication as to who was using it. In fact, the district judge asked the defense attorneys whether the Berrongs lived in the trailer, and the only response he received was that the camper's inhabitants were unknown. The camper trailer was 75 steps from the field. We decline to speculate as to whether the camper trailer was actually used as a dwelling. The appellant must shoulder the burden of proof to demontrate an expectation of privacy. *See United States v. Bachner*, 706 F.2d 1121, 1125-1126 (11th Cir.1983).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[U.S. Court of Appeals, Eleventh Circuit,
Filed Oct. 13, 1983, Spencer D. Mercer, Clerk]

No. 82-8286

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALONZO BERRONG and JACK McKAY,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 22, 11 Cir., 1983, ____ F.2d ____).

(October 13, 1983)

Before TJOFLAT, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ R. LANIER ANDERSON, III
United States Circuit Judge

No. 83-988

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALONZO BERRONG AND JACK MCKAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the warrantless entry onto petitioner Berrong's open field violated the Fourth Amendment.

2. Whether the conspiracy terminated before the making of certain co-conspirator statements that were admitted into evidence.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Constitution, statutes and rule:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-988

ALONZO BERRONG AND JACK MCKAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-11a) is reported at 712 F.2d 1370.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on August 22, 1983. A petition for rehearing (Pet. App. 1b-2b) was denied on October 13, 1983. The petition for a writ of certiorari was filed on December 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846, and possession of marijuana with intent to distribute, in violation of 21

U.S.C. 841(a)(1). Petitioner McKay was sentenced to consecutive terms of 15 years' imprisonment on the conspiracy count and 10 years' imprisonment on the possession count, to be followed by a five year special parole term. He was also fined $50,000. Petitioner Berrong was sentenced to concurrent terms of 10 years' imprisonment on each of the two counts, to be followed by a special parole term of five years. He was also fined $50,000. The court of appeals affirmed (Pet. App. 2a-11a).

1. The evidence adduced at trial established that in July 1981, petitioner McKay, Sheriff of Towns County, Georgia, told Chief Deputy Sheriff Jimmy McKinney that he was involved with petitioner Berrong and several others in growing marijuana on property owned by Berrong. McKay said that the people living near the marijuana field were using security dogs to guard the field. McKay also told McKinney that the marijuana would be harvested between August 5 and 15. 5 R. 528-529.[1] On July 30, 1981, Deputy McKinney advised Special Agent Charles King of the Georgia Bureau of Investigation (GBI) of what McKay had told him (8 R. 92; Pet. App. 4a).

On August 2, 1981, Agent King and Deputy McKinney hired an airplane and pilot and flew over the Berrong property. From an altitude of about 800 feet, Deputy King was able to see a field of marijuana. On August 4, Agent King again flew over the property and confirmed his earlier observation that the field contained marijuana. 8 R. 92-94; Pet. App. 4a-5a.

The next day Agent King instructed Deputy McKinney to call petitioner McKay and tell him that King had information that marijuana was being grown on the Berrong

---

[1] "R." refers to the record in the court of appeals. Record references are taken from the government's brief in the court of appeals.

property and that King planned to go there that day to investigate (5 R. 639-640; 8 R. 147). At the time of the call, GBI agents were already stationed in the woods surrounding the marijuana field, hoping to capture the marijuana growers as they tried to harvest the crop. When almost six hours had passed without anyone coming, the agents raided the field and seized 4,000 pounds of marijuana, as well as a camper trailer and an alarm system. 7 R. 291, 303-308, 377-378; Pet. App. 5a. No arrests were made at that time.

On August 13, 1981, petitioner McKay told Deputy McKinney that he and his associates had lost $20,000 that they had invested in the marijuana field and in equipment. He said that the man who had been living in the camper and growing the marijuana would be back after the first of the year. McKay asked whether McKinney knew of any cave in Towns County where they might grow marijuana, using portable generators and fluorescent lamps. 5 R. 646-647.

On October 14, 1981, Deputy McKinney had a conversation with petitioner Berrong, which was tape recorded. Berrong said that he had the dog box in his house for the guard dogs that had been used to guard the raided marijuana field. He said he had killed one of the dogs because it became vicious. He also told McKinney that on the morning of the raid there were four people at the camper trailer near the marijuana field and that the man who lived in the camper was named Dave. 5 R. 647-648.

In a taped conversation between petitioner McKay and Deputy McKinney on October 28, McKay told McKinney that "Dave" had left Georgia after the August 5 raid and was in Mexico. McKay assured McKinney that only he and petitioner Berrong knew that it was McKinney who had "tipped McKay off" on August 5. McKay told McKinney to stay cool because "they ain't got nothing." Gov't Exh. 26.

On November 5, 1981, Deputy McKinney again spoke with petitioner Berrong and recorded the conversation. Berrong told him that McKay had called Nathan Dowdy to warn him on the morning of the raid and that Dowdy had then warned Berrong. Berrong told McKinney: "They ain't got nobody but me." He said McKay had told him: "If you go to jail, I'm going with you," but Berrong had replied that "nobody goes with me." Berrong told McKinney he would rather go to jail than talk. Gov't Exh. 27.

2. Petitioners moved to suppress certain evidence on the ground that it was the product of a warrantless search of the marijuana field. The motion was denied by the district court. The court of appeals affirmed, holding that the field was outside the curtilage of the Berrong residence and that he had no legitimate expectation of privacy in his open field (Pet. App. 6a-11a).

ARGUMENT

1. Petitioner Berrong contends (Pet. 4-9) that the warrantless entry[2] onto his property violated the Fourth Amendment.[3] This contention is without merit.

a. Petitioner's primary contention (Pet. 4-8) is that the court erred in finding that the field was outside the curtilage. This fact-bound contention is mistaken and plainly does not warrant review by this Court.

---

[2]The agents did obtain a warrant at some point, but it is unclear exactly when the warrant was obtained, and the government did not rely on the warrant to justify the August 5 entry. Thus, the court of appeals treated this case as involving a warrantless entry. Pet. App. 7a n.3.

[3]No rights of petitioner McKay could have been violated by the entry onto Berrong's marijuana field, and it seems from the petition that this contention is made only by petitioner Berrong. In addition, the court of appeals' opinion indicates that the claim was raised there only by Berrong (Pet. App. 4a).

Curtilage is a common law concept denoting an area surrounding the house that is habitually used for family purposes and hence is of heightened privacy interest. See *United States* v. *Van Dyke*, 643 F.2d 992, 993 & n.1 (4th Cir. 1981). In *Care* v. *United States*, 231 F.2d 22, 25 (10th Cir.), cert. denied, 351 U.S. 932 (1956), the court stated that the factors relevant to a determination of the curtilage include "its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family." See also *United States* v. *Williams*, 581 F.2d 451, 454 (5th Cir. 1978); *United States* v. *Van Dyke*, 643 F.2d at 994. The field at issue here was not included within an exclusionary fence surrounding the house (see *United States* v. *Van Dyke, supra*), nor was it within the area occupied by the group of structures making up the farm house (see *United States* v. *Williams, supra; Walker* v. *United States*, 225 F.2d 447, 449 (5th Cir. 1955)). The distance from the residence, one-quarter of a mile, is by itself a strong indication that this field is outside the curtilage; no case of which we are aware has held that the curtilage extends to anything approaching that distance. See *United States* v. *Van Dyke*, 643 F.2d at 993; *United States ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292, 1296-1297 (7th Cir. 1976). And finally, a field of marijuana, unlike a yard or garden, is hardly an area closely associated with the privacy expectation of a residence. The court of appeals and the district court were therefore correct in concluding that the marijuana field was beyond the outer limits of the curtilage.[4]

---

[4]Petitioner's reliance on *United States* v. *Holmes*, 521 F.2d 859 (5th Cir. 1975), aff'd by an equally divided court, 537 F.2d 227 (5th Cir. 1976) (en banc), is unavailing. As the Fifth Circuit explained in a later case, because the full court was equally divided on this issue the judgment of the district court was affirmed, and the panel's opinion has no precedential value. See *United States* v. *Williams*, 581 F.2d at 454. In any event, the facts of that case are distinguishable; agents there approached and peered into a shed located 20 yards from a house and 10 yards from a motor home parked behind the house. See 521 F.2d at 862.

b. Petitioner Berrong also argues briefly (Pet. 8-9) that, even if the marijuana was not within the curtilage, the agents nevertheless were not entitled to enter his field without a warrant. Petitioner correctly notes that there are several cases now pending before this Court concerning the scope of the "open fields doctrine." Because the court of appeals did rely on the open fields doctrine in upholding the entry onto petitioner's field, this Court will perhaps wish to consider whether to hold this case pending its decisions in *Oliver* v. *United States*, No. 82-15 (argued Nov. 9, 1983); and *Maine* v. *Thornton*, No. 82-1273 (argued Nov. 9, 1983). We do not believe such action is necessary.

Even if the defendant's arguments are accepted in *Oliver* and *Thornton*, and the open fields doctrine modified, it is most unlikely that petitioner would be entitled to prevail here. In those cases the defendants argued that they had taken steps to exclude the public from their land, thus allegedly negating the applicability of the open fields doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924). Here, however, petitioner does not point to any steps that he took to exclude the public from his property. The court of appeals found that "[t]he record indicates the total absence of any fence, wall, 'no trespassing' signs, or other artificial obstructions to entry on the property" (Pet. App. 9a n.5). The agents simply walked unobstructed through the woods and fields from a public highway to the marijuana field. Thus, unless *Hester* is completely overruled and an individual's bare property interest is held to be sufficient to invoke the protections of the warrant requirement, we submit that the resolution of *Oliver* and *Thornton* will not affect the correctness of the decision below.[5]

---

[5]Even if the Court were disposed to hold the present petition pending decision in *Oliver* and *Thornton*, it should do so only with respect to petitioner Berrong and should forthwith deny McKay's petition, since the validity of his conviction is unaffected by the "open fields" issue. See p. 4, n.3, *supra*.

2. Petitioner McKay claims (Pet. 9-13) that the district court erroneously admitted into evidence certain co-conspirator declarations, which he maintains were made after the termination of the conspiracy. Relying on *Krulewitch* v. *United States*, 336 U.S. 440 (1949), and *Lutwak* v. *United States*, 344 U.S. 604 (1953), petitioner McKay argues that the conspiracy came to an end when the marijuana field was destroyed on August 5, 1981, and hence that the October 14 and November 5 conversations between McKinney and Berrong implicating McKay were inadmissible.[6] He contends that, as in *Krulewitch* and *Lutwak*, the government cannot achieve admission of these statements by claiming that they were made as part of a further conspiracy to conceal, where no such agreement was alleged or proven.

But petitioner McKay is mistaken in his basic premise that the conspiracy ended with the August 5 raid on the marijuana field.[7] Simply because that particular crop was destroyed did not mean the end of the group's marijuana growing operation. Petitioners had not been arrested, and they were not prevented from continuing with the conspiracy. See *United States* v. *Thompson*, 533 F.2d 1006, 1010-1011 (6th Cir. 1976); *United States* v. *Sarno*, 456 F.2d 875, 878 (1st Cir. 1972). Petitioner McKay himself told Deputy

---

[6]Petitioner McKay does not explain how the October 14 conversation inculpated him; it does not appear to involve him at all. See page 3, *supra*.

[7]Although the indictment did state that the conspiracy lasted until on or about August 5, 1981, the government is not limited to that period for purposes of introducing co-conspirators' statements. Fed. R. Evid. 801(d)(2)(E) does not require that the conspiracy upon which admissibility of the statement is predicated be that charged. Indeed, the rule does not require that a conspiracy be charged in the indictment at all, as long as a concert of action between the defendant and the extra-judicial declarant is established. See *United States* v. *Monaco*, 702 F.2d 860, 880 n.35 (11th Cir. 1983); *United States* v. *Postal*, 589 F.2d 862, 886 n.41 (5th Cir. 1979).

McKinney on August 13 that the man who had been in charge of growing the marijuana would return later, and he told of their plans to try growing marijuana in a cave; indeed, he asked McKinney if he knew of any cave in the county that they might use (5 R. 647-648). Later McKay told McKinney to "stay cool," that they had not been found out, and that he thought the marijuana field had been raided only because Agent King wanted a share of their operation (Gov't Exh. 26). All these statements, admissible against McKay as his own admissions, made clear that the conspiracy was still going on. The August 5 raid terminated only the success of that particular crop, not the plans for the operation as a whole. See *United States* v. *Katz*, 601 F.2d 66, 68 (2d Cir. 1979).

The statements made by petitioner Berrong on October 14 and November 5 were made in furtherance of the ongoing conspiracy. Berrong explained more details of the operation to McKay and assured him that no one would reveal the identities of the participants to the authorities. Their plans for future crops therefore could continue. Thus, the courts below correctly concluded that these statements were admissible under the co-conspirator hearsay exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

MARCH 1984

DOJ-1984-03